CECIA BONEY
DALE DIXON
MCI TELECOMMUNICATIONS CORPORATION
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

JONATHAN JACOB NADLER
SQUIRE SANDERS & DEMSEY
COUNSEL FOR INFORMATION TECHNOLOGY
ASSOCIATION OF AMERICA
1201 PENNSYLVANIA AVE NW
BOX 407
WASHINGTON DC 20044

LEON M KESTENBAUM
JAY C KEITHLEY
SPRINT CORPORATION
1850 M STREET NW
WASHINGTON DC 20036

HENRY GELLER
ALLIANCE FOR PUBLIC TECHNOLOGY
901 15TH ST NW STE 230
WASHINGTON DC 20005

UNITED HOMEOWNERS ASSOCIATION
1511 K STREET NW
WASHINGTON DC 20005

NATIONAL ASSOCIATION OF COMMISSIONS
FOR WOMEN
1828 L STREET NW STE 250
WASHINGTON DC 20036

NATIONAL HISPANIC COUNCIL ON AGING
2713 ONTARIO ST NW
WASHINGTON DC 20009

NATIONAL ASSOCIATION OF
DEVELOPMENT ORGANIZATIONS
444 NORTH CAPITOL ST NW STE 630
WASHINGTON DC 20001

WORLD INSTITUTE ON DISABILITY
510 16TH ST STE 100
OAKLAND CA 94612

PETER ROHRBACH
LINDA L OLIVER
HOGAN & HARTSON LLP
COUNSEL FOR LCI INTERNATIONAL TELECOM
CORP
555 THIRTEENTH ST NW
WASHINGTON DC 20004

MARY MCDERMOTT
UNITED STATES TELEPHONE ASSOCIATION
1401 H STREET NW STE 600
WASHINGTON DC 20005

TERRENCE K FERGUSON
SR VP AND GENERAL COUNSEL
LEVEL 3 COMMUNICATIONS INC
3555 FARNAM STREET
OMAHA NE 68131

GAIL L POLIVY
GTE SERVICE CORPORATION
1850 M STREET NW
SUITE 1200
WASHINGTON DC 20036

RUSSELL M BLAU
RICHARD M RINDLER
SWIDLER & BERLIN CHTD
COUNSEL FOR FOCAL COMMUNICATIONS CORP
HYPERION TELECOMMUNICATIONS INC
KMC TELECOM INC AND MCLEODUSA INC
3000 K ST NW STE 300
WASHINGTON DC 20007

COLLEEN BOOTHBY
LEVIN BLASZAK BLOCK AND
BOOTBHY LLP
COUNSEL FOR THE INTERNET ACCESS
COALITION
2001 L STREET NW STE 900
WASHINGTON DC 20036

DAVID N PORTER
WORLDCOM INC
1120 CONNECTICUT AVE NW
STE 400
WASHINGTON DC 20036

RANDALL B LOWE
PIPER & MARBURY LLP
COUNSEL FOR
TRANSWIRE COMMUNICATIONS LLC
1200 NINETEENTH ST NW
WASHINGTON DC

THOMAS M KOUTSKY
ASSISTANT GENERAL COUNSEL
COVAD COMMUNICATIONS COMPANY
35670 BASSETT STREET
SANTA CLARA CA 95054

GENEVIEVE MORELLI
EXECUTIVE VP AND GENERAL COUNSEL
THE COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M STREET NW STE 800
WASHINGTON DC 20036

MARK C ROSENBLUM
AVA B KLEINMAN
AT&T CORP
295 NORTH MAPLE AVENUE
ROOM 3252J1
BASKING RIDGE NJ 07920

RICHARD D MARKS ESQ
VINSON & ELKINS LLP
NSEL FOR COMPUTER &
COMMUNICATIONS INDUSTRY
ASSOCIATION
1455 PENNSYLVANIA AVE NW
SUITE 700
WASHINGTON DC 20004-1008

M ROBERT SUTHERLAND
BELLSOUTH CORPORATION
1155 PEACHTREE ST NE
ATLANTA GA 30309-3610

J MANNING LEE
VICE PRESIDENT REGULATORY AFFAIRS
TELEPORT COMMUNICATIONS GROUP INC
TWO TELEPORT DRIVE
STATEN ISLAND NY 10311

GEORGE VRADENBURG III
AMERICA ONLINE INC
1101 CONNECTICUT AVE NW
STE 400
WASHINGTON DC 20036

CHERYL L PARRINO
CHAIRMAN
PUBLIC SERVICE COMMISSION OF WISCONSIN
P O BOX 7854
DISON WI 53707-7854

G RICHARD KLEIN
COMMISSIONER
INDIANA UTILITY REGULATORY COMMISSION
302 W WASHINGTON STE E-306
INDIANAPOLIS IN 46204

JEFFREY A CAMPBELL
STACEY STERN ALBERT
COMPAQ COMPUTER CORPORATION
1300 I STREET NW
WASHINGTON DC 20005

MARK J TAUBER
TERESA S WERNER
PIPER & MARBURY LLP
COUNSEL FOR OMNIPOINT COMMUNICATIONS
INC
1200 19TH ST NW SEVENTH FLOOR
WASHINGTON DC 20036

RILEY M MURPHY
AMERICAN COMMUNICATIONS SERVICES INC
131 NATIONAL BUSINESS PARKWAY
STE 100
ANNAPOLIS JUNCTION MD 20701

STEVEN GOROSH
VICE PRESIDENT & GENERAL COUNSEL
NORTHPOINT COMMUNICATIONS INC
222 SUTTER STREET
SAN FRANCISCO CA 94108

JEFFREY BLUMENFELD
CHRISTY KUNIN
BLUMENFELD & COHEN
COUNSEL FOR RHYTHMS NETCONNECTIONS
INC
1615 M STREET NW STE 700
WASHINGTON DC 20036

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Alliance for Public	)	
Technology Requesting Issuance of	)	CCB/CPD 98-15
Notice of Inquiry And Notice of	)	
Proposed Rulemaking to Implement	)	
Section 706 of the 1996	)	
Telecommunications Act	)	

COMMENTS OF
SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of itself and its affiliates including its incumbent local exchange carrier subsidiaries that are Bell Operating Companies ("BOCs") (collectively, "SBC"), respectfully files these Comments regarding the Alliance for Public Technology's February 18, 1998, Petition ("APT Petition").

Although there are areas of divergence, SBC agrees with many of the conclusions reached by APT regarding the lack of incentive for incumbent local exchange carriers ("ILECs") to deploy advanced telecommunications capability. SBC is among those extremely interested in offering high-speed broadband data capacity and other advanced technologies, but there is a real need to remove the regulatory restrictions and limitations imposed on incumbent LECs that have created barriers to investing in those Congressionally-endorsed technologies. As APT understands, investment and capital flow to where the expected returns are at least commensurate with the financial risk. The current regulatory structure almost invariably gives competitors of an incumbent LEC the benefit

of the investment while leaving the incumbent LEC to absorb the risk. That inequitable balance drastically reduces the incentive to invest -- especially in new technologies to provide innovative products to serve unproven markets -- and retards the timing, the size, and the scope of any investment that may be made. Moreover, some regulatory restrictions simply prohibit BOCs and their affiliates from making the investment at all. APT correctly seeks a modification of Commission policies and regulatory obligations to avoid these inevitable results which are contrary to the Congressional goals embodied in section 706 of the Telecommunications Act of 1996.[1]

SBC cannot, however, support APT's call for a Notice of Inquiry ("NOI") and a Notice of Proposed Rulemaking ("NPRM") at this time. The urgent need for Commission action to remove the barriers slowing the deployment of advanced telecommunications capability and to actively promote that investment has been aptly demonstrated in the now pending section 706 petitions[2] and, indeed, echoed by the APT Petition. The Commission must act expeditiously and favorably on those petitions. Only thereafter should the Commission begin the often-lengthy NOI/NPRM process, while at the same time acting promptly on any other section 706 petitions that might be filed.

---

[1] Pub. L. No. 104-104; 110 Stat. 56 (1996).

[2] *See Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11; *Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26; *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability*, CC Docket No. 98-32.

APT'S OVERVIEW OF THE EFFECT OF COMMISSION REGULATION OF THE TELECOMMUNICATIONS INDUSTRY IN GENERAL AND INCUMBENT LECS IN PARTICULAR SHOULD BE CAREFULLY CONSIDERED

APT makes several arguments and points that are extremely well-taken and eloquently made on the interrelationship between the Commission's actions and regulatory policies on ILECs in a competitive, market-driven telecommunications industry. Those arguments and points are given additional weight when one considers the source -- APT, a public interest group that wants to see more innovation in and widespread deployment of advanced telecommunications capabilities without regard to which carrier(s) or class of carrier(s) accomplish that objective. Surveying the regulation of incumbent LECs and the state of advanced networks, APT has rightly concluded that incumbent LECs are in a position to deploy broadband data infrastructure on a widespread basis but are severely hampered and often halted by regulation.

One of APT's points is particularly worth highlighting:

> Government policy, however, must keep pace with this 'market driven' system by removing barriers and creating 'circumstances in which the right innovation signals are given.'

APT Petition, p. 7 (citation omitted). The innovation signal currently given to incumbent LECs can be succinctly stated as "heads your competitors win, tails you lose." Under the Commission's rules on unbundling, there is little that an incumbent LEC might deploy that it cannot be required to unbundle for the benefit of its competitors and at a cost-based rate.[3] Similarly, under the

---

[3] 47 C.F.R. Subpart D; 47 U.S.C. § 252(d)(1). The section 252(d)(1)(B) "may include a reasonable profit" provision has to date proved to be illusory between the use of forward-looking costing by State commissions and the belief that inclusion of a cost of capital component or a minimal amount of allocated common costs suffices for a "profit."

Commission's rules on resale, there appears to be no retail service that an ILEC can provide that it does not also have to provide at a wholesale discount. 47 C.F.R. Subpart G. At the same time, the ILEC's retail prices are almost invariably constrained by State regulation. Thus, if an incumbent LEC risks capital and other resources to deploy a new technology that ultimately achieves market success, its competitors can choose to resell the service, demand the technology be unbundled, or both. The result is that the incumbent LEC has performed all of the development and deployment activities and endured all of the costs and risks, but is allowed to enjoy little if any of the success.

The flip side of the coin is a market failure. In that case, the incumbent LEC has borne all of those costs and risks, and bears the entire burden of the failure. There are neither sufficient retail nor wholesale revenues, nor revenues from unbundled network element charges, to offset those costs. SBC is not arguing that competitors should be forced to share in that failure; rather, this serves to highlight the fact that current regulation allocates the risks and rewards of innovation and investment unfairly and inequitably.[4] And since there is less reward flowing from successful investments to offset the losses of unsuccessful ones, the shareholders of the ILEC ultimately absorb the investment costs through lower profits and a return on investment that is lower than the commensurate risk borne.

In such a regulatory environment where an ILEC can only be assured of returns that do will not compensate for risk, innovation, and investment, the following rational decision alternatives are

---

[4] *See, e.g.*, Democratic Cent. Comm. of the District of Columbia v. Washington Metro. Area Transit Comm'n, 485 F.2d 786 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974), where the Court of Appeals recognized the necessity of equitably and fairly allocating gain to the entity that bore the risk.

presented to the ILEC: wait until the technology and market are proven so that the risk is less and commensurate with the expected return, if ever (and assuming that more attractive investment opportunities are not then available); invest little so that the absolute amount of risk and the effect on the ILEC's overall return may be acceptable; target the investment where the risk is less, thus better equalizing return and risk (*e.g.*, the metropolitan business community); or invest the capital elsewhere. None of these alternatives meet Commission goals in general or section 706 objectives in particular.

Just as APT apparently understands those business realities, the Commission has indicated its understanding as well. Responding to assertions that the incentives for developing innovative new services would be substantially harmed if an overly broad interpretation of the unbundling obligation were adopted, the Commission acknowledged "that prohibiting incumbents from refusing access to proprietary [network] elements could reduce their incentives to offer innovative services."[5] In that context, the Commission rejected that concern -- inappropriately and unadvisedly in SBC's view -- due to a perceive threat to local competition if the new entrant did not have access to an ILEC's innovations. In the context of the section 706 requirement that the Commission "encourage" investment in advanced telecommunications capability, SBC submits that the balance decidedly shifts to the opposite conclusion with respect to high-speed data communications infrastructure. Absent relief from regulatory obligations, APT's conclusion will only become more confirmed --

---

[5] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, para. 282 (1996), vacated in part on other grounds, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), amended on reh'g, 1997 App. LEXIS 28652 (8th Cir. Oct. 14, 1997), cert. granted, 66 U.S.L.W. 3490 (U.S. 1998).

Commission decisions are demonstrably counterproductive to providing the appropriate investment signals to incumbent LECs, to incenting their competitors to deploy their own facilities, and to the overall deployment of advanced telecommunications capability.

CERTAIN APT PROPOSALS DO NOT ELIMINATE OR RELIEVE THE BARRIERS TO INVESTMENT

APT has made several suggestions on how to eliminate the barriers to investment that have been erected. SBC generally agrees that several of those suggestions are a good start; specifically, that unbundling should not be required of advanced telecommunications capability and infrastructure; that the section 251(c) regime should sunset; that depreciation regulation should be eliminated; that the exemption that information service providers enjoy from interstate access charges should be eliminated; and that the Commission should engage in price reform, price flexibility, and retail price deregulation, and encourage the States to do the same. Notwithstanding that substantial agreement with APT, SBC must disagree with other APT suggestions or aspects thereof. The principle areas of disagreement are discussed below.

First and foremost, although SBC does agree with APT that the unbundled network elements ("UNE") platform and TELRIC concepts are not rationale policies and should not be applied to advanced data capabilities,[6] there is a more fundamental reason why neither concept should be applied -- each is unlawful. UNE platform violates sections 251(c)(3) and (c)(4), and the TELRIC

---

[6] APT Petition, pp. 15-21. Moreover, any conceivable FCC policy rationale for UNE platform and TELRIC, as well as unbundling itself, simply does not withstand the Congressional policy mandated in section 706 to "encourage" the widespread deployment of advanced telecommunications capability. In the conflict between those competing policies, the FCC's must submit to the clear expression of Congressional will.

concept section 252(d). APT's proposals for a limited phase-out of their use is insufficient in that APT seems to imply some limited acceptance of both concepts;[7] the FCC should instead abandon both immediately.[8]

SBC also opposes APT's suggested linkage between price cap regulation and its built-in productivity factor with section 706. APT essentially proposes that the .5% "consumer productivity dividend" ("CPD") used to increase an already unlawful productivity factor be eliminated if a carrier meets specific obligations in deploying advanced data infrastructure. APT Petition, p. 29. Beyond the fact that the benefit of such an adjustment would be minor compared to the needed investment,[9] such an inappropriate use of price cap regulation would only compound the errors that already exist with the CPD and the Commission's May 1997 price cap order generally, which is under appeal.[10] Moreover, APT's proposal might lead to embedding new implicit subsidies in a price cap carrier's interstate access rates for the benefit of services that are not included in the definition of universal service, a result that would be directly contrary to the Congressional direction given in section 254

---

[7] APT Petition, pp. 19, 20.

[8] SBC understands that APT wrote its Petition as if the Iowa Utils. Bd. decision had not been rendered. APT Petition, p. 8 n.3. But even without that legal bar to the application of those FCC policies, APT correctly explains how the FCC's UNE platform construct and its TELRIC pricing methodology create substantial barriers to investment, and proposes their elimination.

[9] For example, the .5% adjustment is estimated to represent less than $10 million in annual interstate access revenues for Pacific Bell. Contrast that amount with the estimated $17 billion investment that Pacific Bell had calculated was needed to deploy a high-capacity broadband network in its operating area in California. *See* APT Petition, pp. 34, 35.

[10] *See Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, CC Docket Nos. 94-1, 96-262, 12 FCC Rcd 16642 (1997), appeals pending.

of the 1996 Act.

SBC must also take exception to aspects of APT's proposals on costing and pricing issues and its view of those areas. Although SBC welcomes APT's recommendation that the FCC address ILEC "embedded (stranded) costs," one must be careful to delineate between a carrier's actual costs and that portion of those actual costs that have resulted from uneconomic regulatory policies such as the unduly long depreciation periods cited by APT. APT Petition, pp. 22, 23. As APT advocates, the Commission should fulfill the promise of its prior statements and deal with that portion of an incumbent LEC's actual costs.

However, regardless of whether and when the FCC finally delivers on that promise, an ILEC's costing must be done on an actual cost basis. That basis is the only one that satisfies the section 252(d) standard, the only one that results in "sufficient" universal service support under section 254, and the only one that sends the correct economic signals to both the ILEC and its competitors. As APT elsewhere acknowledges, using a TELRIC cost or other forward-looking cost standard to determine an ILEC's costs (and thereafter prices) eliminates incentives for other carriers to invest in and deploy facilities. APT Petition, pp. 15-21. The failure to use actual costs similarly does not provide the incumbent LEC with an incentive to maintain and expand its existing network, or with a reasonable opportunity to recover its costs and earn a reasonable return.

Basing ILEC pricing flexibility on TELRIC or another forward-looking cost standard is similarly deficient. APT's suggestion that ILECs should be allowed "to match the prices charged by competitors relying very largely on the UNE platform" will not remove the investment barriers

as section 706 requires. APT Petition, p. 27. A simple example demonstrates the problem with flexibility that relies on those cost standards: 1) an ILEC incurs $32 a month in real, actual operating costs to provide telephone service; 2) under the UNE/TELRIC costing structure, an ILEC competitor can obtain from the ILEC the UNEs to duplicate that telephone service at a price of $20 per month; then 3) under APT's suggestion, the ILEC should be able to reduce its regulated prices from $32 to $20. Nowhere is there a suggestion of who ought to pay the $12 a month difference between the actual cost of the service and its theoretical forward-looking cost. Moreover, if an ILEC's non-discrimination obligations require all similarly situated customers to be charged $20/month regardless of whether competitive necessity exists, the actual cost recovery shortfall grows almost exponentially. Thus, although usually any flexibility is better than none, this flexibility would likely be illusory and, since it would be based on forward-looking costs, headed in the wrong direction.

Finally, APT invites the FCC to impose more regulation on incumbent LECs by imposing terms and conditions designed to accomplish section 706 objectives as a condition to approving any merger or acquisition. APT Petition, p. 33. This proposal would be contrary to both the letter and spirit of section 706. Congress authorized the FCC to use deregulatory tools to eliminate regulation that acts as a barrier to investment; claiming section 706 permits the FCC to dictate deployment requirements through merger conditions is directly contrary and unauthorized. Mergers and acquisitions should instead remain subject to the Commission's existing approval process and other applicable approvals. Using that Commission approval process to wring extraneous, unrelated

concessions from an ILEC is not appropriate, and can only act to eliminate or reduce the efficiencies and other benefits sought to be achieved through those mergers.

CONCLUSION

Although there are aspects of APT's Petition with which SBC disagrees, SBC wholeheartedly supports the thrust of the Petition -- the Commission needs to act now to eliminate investment barriers in order to accelerate the deployment of advanced telecommunications capabilities by incumbent LECs. The Commission should rule favorably on the section 706 petitions before considering whether to initiate the NOI/NPRM that APT seeks, while addressing expeditiously any future section 706 petitions. Only that approach will serve to provide the timely catalyst needed to accelerate such deployment and actively promote infrastructure investment as section 706 demands.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: Darryl W. Howard /ef

James D. Ellis
Robert M. Lynch
Durward D. Dupre
Darryl W. Howard

Its Attorneys

One Bell Plaza, Room 3703
Dallas, Texas 75202
214-464-4244

April 13, 1998